

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARTLAND PLYMOUTH COURT)

MI, LLC, d/b/a HEARTLAND HEALTH CARE)

CENTER – PLYMOUTH COURT,)

Petitioner/Cross-Respondent,)

vs.)

NATIONAL LABOR RELATIONS BOARD,)

Respondent/Cross-Petitioner.)

Nos. 15-1034 and 15-
1045

**NATIONAL LABOR RELATIONS BOARD’S UNOPPOSED
MOTION TO FILE SUR-REPLY BRIEF**

The National Labor Relations Board (“the Board”) respectfully requests leave to file a sur-reply brief to Heartland Plymouth Court MI, LLC (“Heartland”)’s Motion for Attorneys Fees (“EAJA Application”) in the above-captioned case, limited to new factual issues raised in Heartland’s reply brief. A copy of the Board’s proposed sur-reply brief has been simultaneously lodged with the Clerk’s Office. Counsel for Heartland does not object to the relief requested by the present motion.

In its reply in support of the EAJA Application, and in response to the Board’s observation that the billing statements submitted in support of the

Application were in fact addressed to its ineligible corporate parent HCR Manor Care (“HCR”), Heartland raises a number of new contentions concerning its relationship with HCR and attaches a new affidavit from HCR Vice President Kathryn Hoops in support of its application. This newly-submitted evidence fails to establish that Heartland has “incurred” fees.

Although the filing of sur-reply briefs is generally disfavored, courts confronted with newly raised arguments and, particularly, new evidentiary affidavits have liberally granted leave to file sur-reply briefs. The Federal Circuit has noted that “[g]enerally speaking, a court should not consider new evidence presented in a reply without giving the other party an opportunity to respond.” *Acumed, LLC v. Stryker Corp.*, 551 F.3d 1323, 1332 (Fed. Cir. 2008) (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.1996)); *see also Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 477 (6th Cir. 2002) (“precedent establishes that, in the face of new evidence, the court should permit the opposing party an opportunity to respond”). And although Board counsel has not located a precedential opinion of this Court establishing a standard for the filing of sur-reply briefs, this Court has cited (and implicitly approved) the D.C. *District* Court’s rule permitting such filings “when a party is unable to contest matters presented to the court for the first time in the last scheduled pleading.” *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (quotation omitted) (when movant for summary judgment

presented evidence for the first time in its reply, opposing party should have requested leave to file a sur-reply).

For these reasons, the Board respectfully requests that this Court grant the instant motion.

Respectfully submitted,

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/s/ Paul A. Thomas
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DATED: July 18, 2016
Washington, DC

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that on that date, I lodged a copy of the NLRB's proposed Sur-Reply with the Clerk of the Court by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Paul A. Thomas

PAUL A. THOMAS

Trial Attorney

DATED: July 18, 2016

Washington, DC